United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7303

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No. 75-7303

In The
United States Court of Appeals
For The Second Circuit

MICHAEL FERGUSON, a minor, by THERESA FERGUSON,
his parent, and on behalf of others
similarly situated

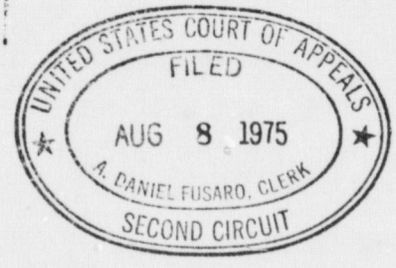
- Plaintiff - Appellant

vs

ARMAND ROY, Individually and as Mayor of the
Town of Enfield, Connecticut

- Defendant - Appellee

BRIEF OF APPELLANT



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OPINION BELOW

The opinion below, is included in the Appendix. It has not been officially reported.

ISSUES PRESENTED

1. Did the District Court err in dismissing the minor plaintiff's claim that the Enfield Town Charter denied his rights under the First and Fourteenth Amendments to the United States Constitution in preventing him from speaking at the annual open town budget hearing?

2. Did the District Court err in dismissing plaintiff's claim that restriction of access to the annual town budget meeting to taxpayers and electors denied him equal protection of the laws?

STATEMENT

A. Proceedings Below

The Plaintiff-Appellant initiated this action seeking relief which would permit him, and all others similarly situated, the right to speak at the annual budget hearing of the Town of Enfield, Connecticut pursuant to the First and Fourteenth Amendments to the Constitution and the Civil Rights Act, 42 U.S.C. §§ 1983. The plaintiff sought injunctive and declaratory relief to restrain officials of the Town of Enfield from denying to those who are neither electors nor taxpayers the right to speak at the annual budget hearing held each year in April, and declaring the denial of the right to speak at the annual town budget hearing to violate plaintiff's rights to

free speech, to petition for redress of grievances and to equal protection of the laws.

On April 15, 1975, the plaintiff, a minor by his parent, individually and on behalf of all others similarly situated, filed the complaint in this action in the United States District Court for the District of Connecticut. The complaint was accompanied by an application for an Order to Show Cause for Preliminary Injunction. A hearing was held on that application before the Hon. T. Emmet Clarie on April 22, 1975. In his Ruling on Application for Order to Show Cause, dated April 28, 1975, Judge Clarie denied the request and dismissed the action. The Court held that the Town of Enfield's restriction on the right to speak to electros or taxpayers was a reasonable policy and that there was no possible basis for granting injunctive relief. Appendix, p . There was no ruling as to the maintenance of this suit as a class action. This appeal was filed on May 16, 1975 seeking reversal of the lower court.

B. Statement for Facts

On the question of propriety of dismissal, the allegations of the complaint are taken as true.

Plaintiff-Appellant, Michael Ferguson was a 17 year old junior at the Enfield High School at the time this action was initiated. It was brought with the consent and approval of his

mother, Theresa Ferguson, and on behalf of all others similarly situated. Appendix, p .

Defendant-Appellee, Armand Roy, is the Mayor of the Town of Enfield, Connecticut and is responsible for the enforcement and operation of the Town Charter of the Town of Enfield, Connecticut. Appendix, p. .

Each April, the Town Council of Enfield holds at least one "public hearing - at which any elector or taxpayer may have an opportunity to be heard regarding appropriations for the ensuing fiscal year." Appendix, p. .

In April, 1973, Plaintiff, then a student at the John F. Kennedy Junior High School, desired to speak at the annual meeting. He was representative of the Student Council and wanted to present a petition signed by many fellow students and be heard in opposition to any further reductions of the budget of the Board of Education. Appendix, p .

At the annual meeting, held at the Enfield High School, anyone who desired to be heard was required to sign a pre-registration list at a table in the auditorium. An Assistant Town Clerk assisted persons at the table. Appendix, p . The pre-registration list provided for the names and addresses of all persons desiring to speak. Appendix, p . Plaintiff, and others, approached the table to sign the pre-registration list, but was not allowed to sign the list, and was told he could

not speak at the budget hearing. When he pursued the reasons for his being denied the right to speak, he was told by the then Mayor of Enfield that Chapter VI, Section 4 of the Town Charter prohibited anyone who was not an elector or taxpayer from speaking at the meeting. Appendix, p .

No voter or taxpayer was refused the opportunity to speak; in fact numerous persons did speak at the meeting. Chapter VI, Section 4 of the Town Charter has been selectively enforced by town officials against persons, including the plaintiff, who are neither electors nor taxpayers. Appendix, p .

In 1974, plaintiff inquired prior to the annual budget meeting and was told that he would again be denied the right to speak. Prior to the annual budget meeting, plaintiff sought legal counsel and initiated this action requesting injunctive and declaratory relief to enable him to speak at the 1975 budget meeting. The District Court denied relief ruling on the day of the hearing.

The case was brought as a class action on behalf of "all persons who are neither electors nor taxpayers of the Town of Enfield" (Appendix, p) under Rule 23 F.R. Civ. P., and claimed injunctive and declaratory relief, thereby stating a claim under subsection (b)(2). The District Court in dismissing on the merits did not comment on the class action status; thus it retains the character of a class action. Advisory Committee Notes,

39 F.R.D. 69, 104 (1966); Gaddis v. Wyman, 304 F. Supp. 713, 715 (S.D.N.Y. 1969).

I. THE ENFIELD TOWN CHARTER, CHAPTER VI, SECTION 4 VIOLATES PLAINTIFF'S RIGHTS TO FREE SPEECH AND PETITION FOR REDRESS OF GRIEVANCES.

Appellant submits that what is primarily at stake in this case is the fundamental rights of free speech and petition for redress of grievances contained in the First Amendment. The importance of these rights is so great as to need little elaboration. They have often been referred to as "the preferred position of freedom of speech." Kovacs v. Cooper, 336 U. S. 77, 90-96 (1949)(Frankfurter, J. concurring). The Town of Enfield, through its Charter, has set up a specific public forum for its residents to voice their thoughts as regards the annual budget. However, this public forum for exercise of the right to free speech and to petition for redress of grievances has been denied entirely to one class of persons - minors. It is this total denial of First Amendment rights that is being challenged.

It is axiomatic that minors have the same First Amendment rights as adults. In re Gault, 387 U. S. 1 (1962); Tinker v. Des Moines School District, 393 U. S. 503 (1969).

> Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves

> must respect their obligations to the State . . . on the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. Tinker v. Des Moines School District, supra, at 511.

Appellant submits that Chapter VI, Section 4 of the Enfield Charter denies the class of minors their freedom of expression for reasons, if any, that are not constitutionally valid, and do not promote a compelling state interest. At the hearing in the District Court, the Town argued that those persons excluded from the public hearing by the regulation in question were not "interested" persons (TR 28, 30). There is no merit to this argument, as the plaintiff, a student in the Enfield public schools, is perhaps the person most directly interested in, and affected by, the Council on the Budget's actions. To define "interested" in any way that excludes persons directly affected by the Council's actions is to deny the realities.

Appellant submits that the District Court erred in finding that the regulation is a reasonable classification. The Court below found this on the basis that the Town has an interest in the orderly and efficient manner in which the public hearing is conducted. The attorney for the Town pointed out at the hearing below that there are a number of procedural restrictions on those citizens who are allowed to participate in the hearing. All those who wish to speak must register with the clerk at the hearing (TR, 27) and then can speak initially

for only five (5) minutes and afterwards for ten (10) minutes Tr. 28, 29). The appellant has no objections to these time and procedural rules which regulate the exercise of a citizen's First Amendment rights. However, the Charter provision entirely disallows the minors any freedom of expression.

The Town admitted at the hearing below that minors are regularly allowed to and do speak at monthly Town Council meetings (Tr. 23). The appellant fails to see how the Town's alleged interest in having orderly and efficient public meetings is so compelling at the annual budget hearing but not at monthly Town Council meetings as to constitutionally deny a class of citizens any exercise of their First Amendment rights. The Supreme Court noted in Tinker, supra, that "...undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Id., 393 U. S. at 508. To reiterate, there is a constitutionally significant difference between providing rules to insure orderly and efficient meetings and a flat prohibition of expression for a particular class of persons.

Appellant submits that the District Court erred in relying on Prince v. Massachusetts, 321 U. S. 158 (1944) as support for the proposition that First Amendment rights may not apply with the same force to minors as to adults. In Prince, it was held that the state's child labor laws promoted a legitimate interest in protecting the health safety and welfare

of minor children could outweigh the minor's First Amendment rights. The aim of such legislation is to protect minors from potential injury. However, this principle is unapplicable to the case at bar, where minors are exercising their rights through their own power. It has not been suggested, nor could it be, that those minors who want to speak at the Council on the budget hearings must be protected by the Town from potential injury. The more recent cases of Tinker v. Des Moines School District, supra, and In re Gault, supra, indicate that the First Amendment rights of minors are regarded equally with those of adults.

It is axiomatic that regulations on speech must be narrowly and precisely tailored to fulfill compelling state interests. Zwickler v. Koota, 389 U.S. 241 (1967); Thornhill v. Alabama, 310 U.S. 88 (1940). Assuming arguendo that ths orderly presentation of the business before a public meeting is such an interest, and one sought to be advanced by Chapter VI Section 4, the question becomes whether the regulation is sufficiently narrow to reflect only the legitimate interest at state.

Counsel for the Town admitted that he could see no harm to that interest in permitting the individual plaintiff to appear and speak, but that the Town desires to prevent a teacher from bringing fifteen 10 year-old students down to pack the meeting (Tr., 27-28). The implication seemed to be that some

persons might be induced to use the opinions of the meeting as a game. Assuming arguendo that prohibition of such use of the public forum would be a legitimate purpose, the town admits in this case that its prohibition sweeps much more broadly.

Additionally, the Charter does not narrowly advance a purpose of upholding parental control by denying minors unfettered license to speak. A requirement that elementary school children have parental permission to speak might advance this purpose. The restriction here is not limited to those presumably too young to contribute meaningfully to public debate, but rather it flatly prohibits speech by all but two categories.

Furthermore, since it completely prohibits speech in the town-sponsored forum of a public hearing by minors, such a purpose is not legitimate, and goes far beyond a necessary procedural regulation. See Tinker v. Des Moines School District, supra.

II. THE ENFIELD TOWN CHARTER CHAPTER VI SECTION 4 VIOLATES EQUAL PROTECTION

By its terms Chapter VI Section 4 creates two classes of persons as regards participation in the annual town budget hearing. Electors and taxpayers are permitted to testify at the hearing (Exhibit A to Complaint, Paragraph 20). Persons not

electors or taxpayers are not. Plaintiff, and the class he represents, are disadvantaged by the classification. In April 1973, the section was enforced to prevent plaintiff Ferguson and others from speaking at the annual town budget meeting (Complaint, Paragraph 11-14).[1]

In determining whether governmental action at the federal, state or local level violates the equal protection principle, courts have applied standards of review ranging from lenient to stringent. See "Developments in the Law - Equal Protection", 82 Harv. L. Rev. 1065 (1969). Two standards are generally contrasted: (1) the lenient or "reasonable relationship" test: (2) the strict "scrutiny" test met only by demonstration of a "compelling state interest", applicable when the action invokes a "suspect" criterion or impinges upon a "fundamental right". In recent commentary and judicial opinion jurists have noted the emergence of "an 'intermediate approach' between rational basis and compelling interest as a test of validity under the equal protection clause" Eslinger v. Thomas, 476 F.2d 225, 231 (4th Cir., 1973). This approach focuses on the substance

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[1]The plaintiff also alleged that the section was selectively enforced against persons favoring an expanded school budget: Complaint Paragraph 16, 20(b).

of the governmental interest sought to be served and calls for assessment of the reasonableness of the means by which the regulation in question attempts to advance the identified interest. See Gunther, "The Supreme Court, 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection", 86 Harv. L. Rev. 1 (1972); Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972); Green v. Board of Education 473 F.2d 629, 633 (2nd Cir. 1973)..

In Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) the Supreme Court held that a Chicago ordinance which permitted picketing near schools in connection with a labor dispute but forbade the same picketing under other circumstances, violated equal protection. Justice Marshall, writing for the Court, held:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,; and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.
>
> Guided by these principles, we have frequently condemned such discrimination among different users of the same medium for expression. (408 U.S. 92, 96).

In Thompson v. Shapiro, 394 U. S 618 (1969), the Supreme Court struck down a residency requirement for welfare benefits, finding a denial of equal protection because the classification impinged upon a constitutional right and failed to embody a perfect fit of a legitimate state purpose. Mr. Justice Stewart held, for the Court:

> In moving from State to State...appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional. 394 U. S. at 634

A fortiori, where the classification completely prevents exercise of a constitutional right, it is presumptively invalid. See also Fowler v. Rhode Island, 345 U. S. 67 (1953) and Niemotko v. Maryland, 340 U. S. 268 (1951). Likewise here appellant was attempting to exercise a fundamental right -- to petition for redress of grievances regarding the school budget -- in the only procedural channel set up for that particular purpose -- the town budget hearing, and was prevented from doing so by the classification at issue here.

The Town argued that it was attempting to prevent burdening the hearing by excluding persons who were not "interested" in the issue (Tr. 28, 30). This was the only purpose articulated in support of the classification. As the Town attorney elaborated the concept of interest to which he was referring:

> . . . it is a question of allowing those people to speak who we feel have a real interest in the tax setting, the rate setting process, so to speak (Tr. 28).

While it may be a legitimate purpose to limit direct participation in a hearing on a town budget to those who have some real stake in the outcome, that purpose is not advanced by this definition of interested parties for several reasons. First, the definition of interested parties excludes persons like appellant, whose chief interest is in the resulting educational system;[2] indeed, appellant alleged that students are the only persons excluded from participation. Second, the classification does not perfectly or even rationally further the alleged purpose since it permits individuals who are electors but not property taxpayers to speak. Third, it assumes, incorrectly, that individuals who do not own real property, also do not support town schools financially.

The Town argued that the provision at issue was a regulation which defined "interested parties" for purposes of budget hearings. The plaintiff agrees that the conduct of public meetings, including hearings involving direct citizen

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[2]Certainly there is a connection between budget and resulting services, though it is not a one-to-one relationship. See e.g., Horton v. Meskill, 31 Conn. Sup. 377; 36 Conn.L. J. 43.

participation, require procedural regulation. Thus, no attack is made here on a sign-up list requirement, or the 5-minute and 10-minute speaking rules, nor upon the non-discriminating parliamentary rules. But an operating definition of interested parties which systematically excludes from participation, those persons whose self-interest would incline them to one side of the issue under debate is the antithesis of equal protection of the laws. See Carrington v. Rash, 380 U.S. 89 (1965); Kramer v. Union School District, 395 U.S. 62 (1969); and Cipriano v. City of Houma, 395 U.S. 701 (1969). The definition of interested parties as including taxpayers and electors while totally excluding students under the age of 18 is precisely such a discrimination.[3]

The Town's definition of interested parties discriminates on the basis of the expectable content of the speech as effectively

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[3]Appellant recognizes the substantial distrinction between the right to petition for redress of grievances involved here, and the right to vote. Appellant is not claiming a right to vote in a town meeting: the budget hearing is concededly not a voting meeting (Tr. 29-30). Hence C.G.S. Section 7-6 which governs voting in Town meetings is of no relevance whatsoever and is not drawn in question by this complaint. Nor would the right to vote follow inexorably from the right to petition: the public need to regulate voting as a decision-making process is clearly greater and may require artitrary age-lines for meaningful regulation. No such interests appear with regard to pure speech.

as did the Chicago ordinance struck down in Mosley. Indeed the discrimination on the basis of content is even clearer here since the Chicago ordinance at least permitted all persons having some interest in a labor dispute to speak, while the present provision simply excludes persons who may be expected to hold a particular point of view.

The Town's position boils down to the notion that youth is a presumptively valid basis for discriminatory classification. The District Court found, though without evidence, that residents over the age of 18 were permitted to speak under the challenged procedure (Appendix, p), and went on to base its dismissal on the idea that "the protections of the First Amendment do not apply under all circumstances with the same force to minors as to adults." Ibid., Prince v. Massachusetts, 321 U. S. 158 (1944), cited by the District Court in support of this proposition, is readily distinguishable since it upheld a purpose to protect minors generally where the Enfield Town Charter has no such purpose. A presumption of validity in discriminatory treatment of youths has been decisively rejected by all recent Supreme Court decisions bearing on the subject: In re Gault, supra; Tinker v. Des Moines School District, supra; Breed v. Jones, ____ U. S.___44 L. Ed 2d 346 (1975).

Appellant submits that the District Court erred in failing to apply a strict scrutiny test to the classification in

question, because it impinges on a fundamental interest, the rights of free speech and citizen participation in government and that the classification here does not meet the rational relationship test. One could hardly argue that a town ordinance which permitted distribution of leaflets on the street unless the distributors were Jehovah's Witnesses was not violative of equal protection. Yet if Enfield may hold an "open" public hearing but totally exclude those persons who are not taxpayers or electors, what would prevent such an ordinance? The classifications of Enfield Town Charter Chapter VI Section 4, not only fail to constitute the perfect fit required of classifications impinging on a fundamental interest, but fail to bear a rational and substantial relationship to any legitimate articulated purpose. See e.g., Royster Guano v. Virginia, 253 U. S. 412 (1920). And the purpose to which the classification does appear to relate is clearly not legitimate, Police Department v. Mosley, supra; Kramer v. Union School District, 395 U. S. 62 (1969); In re Gault, supra. It therefore violates equal protection and the District Court erred in dismissing.

CONCLUSION

Chapter VI, Section 4 of the Enfield Town Charter is unconstitutional in two respects. It denies to an entire class of citizens - minors - their rights to free speech and to petition for redress of grievances. There is and can be no compelling interest in silencing the plaintiff class. The First Amendment rights of minors are in the context of this case the same as adults. Tinker v. Des Moines School District, supra.

Additionally, the provision provides a forum for free speech and petitioning for redress of grievances to some citizens, but denies the

exercise of those rights entirely to the class of minors. The District Court erred in finding a justification for this denial of equal protection.

The District Court erred in dismissing. Accordingly appellant prays this Court reverse the District Court dismissal, and remand for further proceedings.

Respectfully submitted,

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